

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation into the Operations and Practices of
Qwest Communications Corporation, et al.
Concerning Compliance with Statutes,
Commission Decisions, and Other Requirements
Applicable to the Utility's Installation of Facilities
in California for Providing Telecommunications
Service.

Investigation 00-03-001
(Filed March 2, 2000)

**ADMINISTRATIVE LAW JUDGE'S RULING DIRECTING FILING OF
PREHEARING CONFERENCE STATEMENTS**

This ruling directs the Consumer Protection and Safety Division (CPSD) and Qwest Communications Corporation (QCC) to file prehearing conference (PHC) statements in advance of the upcoming PHC in this matter, which is to be held at 10 a.m. on March 10, 2004.¹ The PHC statements required by this ruling should be served electronically on all parties no later than 4:30 p.m., on Monday, March 8, 2003. The Salinan Nation, an intervenor in this proceeding, may file a PHC statement if it wishes to do so.

¹ Notice of the PHC was mailed to all parties on February 19, 2004.

The purpose of the PHC is to devise a schedule for bringing this proceeding to a conclusion. It is being held in the wake of the Joint Ruling issued by Assigned Commissioner Lynch and me on December 30, 2003.²

Procedural Background

The December 30, 2003 Joint Ruling denied a motion filed on September 19, 2003 by CPSD and the Salinan Nation. The Joint Ruling concluded that on the basis of the current record, it was not possible to rule, as CPSD has contended, that all of the construction activity at issue in this case occurred pursuant to the certificate of public convenience and necessity (CPCN) granted in Decision (D.) 97-09-110. As explained in the Joint Ruling, that CPCN was subject to a Mitigated Negative Declaration (MND) with which QCC and its affiliates admittedly did not comply prior to the Stop Work order issued by the Commission staff on December 16, 1999.³ (Joint Ruling, pp. 5-6, 8.)

At the same time, however, the Joint Ruling concluded that it was not possible to rule in QCC's favor on its contention that all of the construction activity at issue in this case took place pursuant to the CPCN originally issued to QCC's predecessor, Southern Pacific Telecommunications Company (SP Telco) in D.93-10-018. That CPCN is not subject to an MND, and QCC had contended

² Joint Assigned Commissioner's and Administrative Law Judge's Ruling Concerning Joint Motion by the Consumer Protection and Safety Division and the Salinan Nation Regarding "Jurisdictional" Issues, issued December 30, 2003. Hereinafter, this ruling will be referred to as either the "Joint Ruling" or the "December 30, 2003 Joint Ruling," as the context requires.

³ As stated in footnote 2 of the December 30, 2003 Joint Ruling, there has been no suggestion in this case that Qwest Inc. and its affiliates have failed to abide by the Cultural Resource Protocols that were imposed as a condition of lifting the December 16, 1999 Stop Work Order.

that as a result of the advice letter process used in 1994 to convert the D.93-10-018 CPCN into authority to operate as a facilities-based reseller of interLocal Access Transport Area (LATA) services, SP Telco had obtained authority to construct facilities, and that it was pursuant to this authority that QCC had performed the trenching work at issue in this case. However, the Joint Ruling concluded that “QCC has offered no proof that in the period before 1999^[4], the Commission considered facilities-based resale authority obtained through the advice letter process to be sufficient to authorize construction.” (Joint Ruling, pp. 8-9.)

Discussion

In view of the conclusion in the Joint Ruling that, based on the current record, neither CPSD nor QCC is entitled to a judgment in its favor on the issues briefed in June 2001, it is necessary to devise a plan for going forward with this case. In their PHC statements, CPSD and QCC should both propose realistic schedules for taking this matter to a hearing. In particular, CPSD and QCC should indicate whether the timelines set forth in Carol Dumond’s September 17, 2003 e-mail message still seem realistic,⁵ or whether the parties expect to need more or less time for particular steps.

⁴ It is undisputed that since 1999, the Commission has consistently ruled that authority to act as a facilities-based reseller of interLATA services does *not* include the authority to construct facilities.

⁵ In her e-mail, Ms. Dumond described the following as the parties’ “best guess” about a schedule after issuance of a ruling on CPSD’s September 9, 2003 motion:

- The RFP process to get a new expert will take about 4 months.
- We believe it will take the expert 4-6 months to review all the facts and issue a report.
- Qwest will need another 2-4 months to do any additional discovery and prepare a response.

Footnote continued on next page

The discussion at the October 8, 2003 PHC in this case may also furnish some assistance in developing a schedule, and raises a number of issues that I want the parties to address in their PHC statements. The first of these issues is what progress CPSD has made in hiring an archaeological consultant, since hiring such a consultant was a key determinant in the schedule proposed by Ms. Dumond in her September 17, 2003 message. During the October 8 PHC, CPSD at first took the position that because of the request-for-proposal (RFP) process it must follow under state law, the hiring of a new consultant was likely to take four to six months. (PHC Transcript, p. 84.) Later, however, CPSD counsel suggested that because the RFP papers CPSD had prepared in 2000 might serve as a useful model, it was possible the RFP process could take less time. (*Id.* at 92-93.) Mr. Castro of the Salinan Nation also stated that, contrary to earlier suggestions, Dr. Terry Jones of California Polytechnic Institute- San Luis Obispo might once again be interested in serving as CPSD's archaeological consultant. (*Id.* at 96-97.) In its PHC statement, CPSD should indicate what progress it has made in hiring an archaeological consultant, whether the scope of the consultant's work has been defined, when CPSD expects the consultant will be able to begin work, and how long CPSD expects it will take to prepare the consultant's report.

A second issue the parties should address in their PHC statements is what discovery they have engaged in since the October 8 PHC. At that time, I suggested that while CPSD was waiting for a ruling on its September 9, 2003

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- Staff and the Salinan Nation will need two weeks to review Qwest's response. Thus, the total time needed to get to hearing in this proceeding will be 10½ to 14½ months *after* the ruling is issued.

motion, it could review the work that Dr. Jones apparently did on this case between December 2000 and June 2001. Other topics on which it appeared discovery could go forward included the basis for QCC's assertion that the 1994 advice letter conversion process gave it construction authority, and the nature of the construction organization that QCC maintained in California during the late 1990s. (*Id.* at 80-82.)

Although the December 30, 2003 Joint Ruling concluded that QCC had not proven that it had authority to construct under the CPCN first granted in D.93-10-018, the Joint Ruling left open the possibility that QCC might still be able to demonstrate such authority. (Joint Ruling, pp. 8-10.) In its PHC statement, QCC should therefore indicate whether it has taken any steps to develop such proof, and if so, how much time it will need to complete this work. In the alternative, if QCC has concluded that it cannot substantiate its claim of authority to construct under the CPCN granted in D.93-10-018, then QCC should state whether it is willing to concede such lack of authority and proceed directly to hearing on the issue of what penalties should be imposed for the trenching and other work that led to the December 16, 1999 Stop Work order.

Finally, if the parties have conducted any settlement discussions since the October 8, 2003 PHC, they should state in general terms whether they have made any progress, and if they think a settlement is feasible, when a settlement proposal might be filed.

In accordance with the aforesaid discussion, **IT IS RULED** that:

1. The Consumer Protection and Safety Division (CPSD) and Qwest Communications Corporation (QCC) shall file prehearing conference (PHC) statements addressing the above-noted issues no later than the close of business on March 8, 2004.

2. In addition to service by mail, CPSD and QCC shall serve all parties electronically with their PHC statements no later than 4:30 p.m., on March 8, 2004.

3. In the event the Salinan Nation wishes to file a PHC statement, it may do so subject to the same conditions set forth in Paragraphs 1 and 2 above.

Dated March 2, 2004, at San Francisco, California.

A. KIRK MCKENZIE

A. Kirk McKenzie
Administrative Law Judge

CERTIFICATE OF SERVICE

I certify that I have by mail, and by electronic mail to the parties to which an electronic mail address has been provided this day served a true copy of the original attached Administrative Law Judge's Ruling Directing Filing of Prehearing Conference Statements on all parties of record in this proceeding or their attorneys of record.

Dated March 2, 2004, at San Francisco, California.

/s/ JANET V. ALVIAR

Janet V. Alviar

N O T I C E

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address to insure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.

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If specialized accommodations for the disabled are needed, e.g., sign language interpreters, those making the arrangements must call the Public Advisor at

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(415) 703-2074 or TDD# (415) 703-2032 five working days in advance of the event.